

**STATE OF INDIANA
BEFORE THE INDIANA ALCOHOL & TOBACCO COMMISSION**

**IN THE MATTER OF
THE PERMIT OF:**

TRI STAR MARKETING, INC.

D/B/A

SUPER PANTRY # 18

6533 STATE ROAD 38 EAST

LAFAYETTE, IN 47905

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PERMIT NO. DL79-25457

Applicant.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. BACKGROUND OF THE CASE

Tri Star Marketing, Inc. d/b/a Super Pantry #18 ("Applicant"), 6533 State Road 38 East, Lafayette, Indiana, permit number DL79-25457, through counsel Jeffrey L. McKean, is the Applicant for a new Type 115¹ Alcohol and Tobacco Commission ("ATC" or "Commission") beer and wine permit. The application was assigned to the Alcoholic Beverage Board of Tippecanoe County ("Local Board"). The Local Board held a hearing on December 10, 2008 ("LB Hearing") and voted three (3) to one (1) to deny the application. The ATC adopted the Local Board's recommendation on December 16, 2008, at its regular public meeting.

The Applicant filed a timely Notice of Appeal and the matter was assigned to ATC Hearing Judge E. Edward Dunsmore ("Hearing Judge"). An appeal hearing was held on June 15, 2009 ("Appeal Hearing") and at that time, witnesses were sworn, evidence was received and the matter was taken under advisement. The Hearing Judge, having read the typed transcript of the LB Hearing, the evidence submitted to the ATC during the Appeal Hearing, and the contents of the entire ATC file, as well as having taken official notice of the same as well as the codes and standards adopted by this state, now tenders his Findings of Fact and Conclusions of Law to the Commission for its consideration.

II. PROCEDURAL HISTORY

1. On September 26, 2008 Applicant filed its Application for a New or Transfer Permit.
2. On December 10, 2008 the Local Board held a hearing and voted three (3) to one (1) to deny the application.
3. On December 16, 2008 the ATC adopted the Local Board's recommendation.
4. On December 31, 2008 the Applicant timely filed its request for administrative review and request for appeal hearing within the fifteen (15) day deadline required by 905 IAC 1-36-2.

¹ Beer and wine (grocery) dealer located in an incorporated area. Ind. Code 7.1-3-5-2(a).

5. No remonstrators filed a petition for intervention, as required by 905 IAC 1-36-2.
6. On June 15, 2009 the Hearing Judge conducted a hearing regarding the Applicant's appeal.

III. EVIDENCE BEFORE THE LOCAL BOARD

- A. The following individuals testified before the Local Board in favor of the Applicant in this case:

1. Brian Wente, Marketing Manager of Tri Star Marketing, Inc.
2. Jeffrey L. Mckean, Attorney for Tri Star Marketing

- B. The following individuals testified before the Local Board against the Applicant in this cause:

1. Robert Bowman, Remonstrator and former Local Board member.
2. Greg Boesch, Remonstrator and owner of Bedrock Liquors package store in Dayton, Indiana.
3. John Cunningham, Remonstrator and owner of Kork and Keg Liquors in Frankfort, Indiana and Lafayette, Indiana.
4. Karah Rawlings, Remonstrator and appearing on behalf of the Drug Free Coalition of Tippecanoe County.
5. Connie Vicker, Remonstrator and lobbyist for the Indiana Association of Beverage Retailers.

- C. The following evidence was introduced and admitted before the Local Board in favor of the Applicant in this cause:

1. Aerial map of area where Applicant's business is located (Exhibit 1)
2. Application for Improvement Location Permit and Certificate of Occupancy and Improvement Location Permit (Exhibit 2)
3. Dealer's Permit statute (IC 7.1-3-22-4) (Exhibit 3)
4. Indiana Beverage Grocery Store Permits Quotas for Pre and Post July 2008 from the records of the Indiana Alcohol and Tobacco Commission (Exhibit 4)
5. MapQuest records showing distance between Village Pantry #447 and Applicant's business location (Exhibit 5)
6. Petition with names and addresses of those in favor of Applicant receiving an alcohol permit (Exhibit 6)
7. Project ACE-Alcohol Compliance Enforcement data sheets for 8 Indiana counties (Exhibit 7)
8. *Wine & Spirits Wholesalers of Indiana v. Indiana Alcoholic Beverage Commission*, 556 N.E.2d 17 (Ind. App. 1990) (Exhibit 8)

- D. The following evidence was introduced and admitted before the Local Board against the Applicant in this cause:

1. Letter dated November 7 2008 from Mike Harris, Council President, Town of Dayton in opposition to the issuance of the alcohol permit on behalf of the Council (#1)
2. Letter dated November 11, 2008 from Dr. John Walls, Senior Pastor, Dayton United Methodist in opposition to the issuance of the permit on behalf of the Administrative Council of the church (#2)
3. Petition in two parts with names and addresses of those opposed to another alcohol permit

IV. EVIDENCE BEFORE THE COMMISSION

A. The following individuals testified before the Commission in favor of the Applicant in this cause:

1. Brian Wente, Marketing Manager of Tri Star Marketing, Inc.
2. Scott Imus, former director of Indiana Petroleum Marketers and Convenience Store Operators
3. Jeffrey L. McKean, Attorney for Tri Star Marketing, Inc.

B. The following individuals testified before the Commission against the Applicant in this cause:

None.

C. The following evidence was introduced and admitted before the Commission in favor of the Applicant in this cause:

1. Super Pantry Information Sheet from ATC Files (Exhibit 1)
2. Aerial Photograph of Site (Local Board) (Exhibit 2)
3. Second Aerial Photograph of Site (Local Board) (Exhibit 3)
4. Aerial Photograph showing no permits within 3 mile radius (Exhibit 4)
5. Photographs of Super Pantry and surrounding area (Exhibit 5)
6. Tri Star charitable donations exhibit (Exhibit 6)
7. Convenience Stores Industry sales data (Exhibit 7)
8. Statutory definition of "grocery/convenience store" (Exhibit 8)
9. List of convenience stores with alcohol permits in Tippecanoe County (Exhibit 9)
10. List of convenience stores with alcohol permits in Indiana (10)
11. Customer petitions in support of permit for Appeal hearing (565) (Exhibit 11)
12. Customer petitions in support of permit for LB hearing (70) (Exhibit 12)
13. Summary of customer petitions in support of permit (Exhibit 13)
14. Tri Star alcohol sales policies and training rules. (Exhibit 14)
15. Quota exhibit for Town of Dayton (Exhibit 15)
16. Project ACE enforcement statistics (Exhibit 16)
17. Standard of review statute (IC 7.1-3-19-11) (Exhibit 17)
18. *Wine and Spirits Wholesalers v. Indiana ABC*, 556 N.E.2d 17 (1990) (Exhibit 18)
19. Kocolene Decision, Hendricks Circuit Court (1984) re 1979 app. (Exhibit 19)
20. Amoco Findings (2004) (Exhibit 20)

21. Casey's Findings (2005) (Exhibit 21)
22. Mac's d/b/a Circle K Findings (2005) (Exhibit 22)
23. Taylor Oil Findings (2008) (Exhibit 23)
24. Gas America Findings (2008) (Exhibit 24)
25. Tippecanoe County Local Board Hearing Transcript (12/10/2008) (Exhibit 25)

D. The following evidence was introduced and admitted before the Commission against the Applicant in this cause:

None.

V. FINDINGS OF FACT

1. Tri Star Marketing, Inc., d/b/a Super Pantry #18 ("Applicant", or "Super Pantry #18"), located at 6533 SR 38 East, Lafayette Indiana 47905, is an applicant for an ATC type 115 beer and wine permit, permit #DL79-25457. (ATC File)

2. Tri Star Marketing, Inc., is an Illinois based for profit, corporation located in Champaign IL, that has existed for approximately 26 years, being incorporated in the State of Illinois in 1983. (ATC File)

3. Tri Star Marketing is authorized to do business in the State of Indiana by the Indiana Secretary of State and is in good standing with the Indiana Secretary of State. (ATC File)

4. What is now Tri Star Marketing, Inc. was formerly Russell Stewart Oil Company and has been conducting business for approximately 62 years. (Appeal Hearing)

5. Tri Star Marketing, Inc. operates 51 convenience stores; 49 in Illinois and 2 in Indiana. (Appeal Hearing)

6. Of the fifty-one (51) convenience stores, Tri Star Marketing, Inc. has permits to sell beer and wine in forty-two (42) of these stores; forty-one (41) stores are in Illinois and one (1) store is located in West Lafayette, Tippecanoe County. The West Lafayette store has held a permit for two and one half years. (Appeal Hearing)

7. Tri Star Marketing, Inc. has never been cited for any violations in regard to its sale of alcohol in its store located in West Lafayette, Indiana. (Appeal Hearing)

8. The Super Pantry #18, located at 6533 SR 38 East, Lafayette, Indiana, has been at this location for 25 years. (LB Hearing, Appeal Hearing)

9. The Super Pantry #18, in 25 years, has had only one failure regarding a license and that was for a cigarette sting conducted in July of 2004, which resulted in the immediate termination of the employee. (LB Hearing, Appeal Hearing)

10. Tri Star Marketing, Inc. conducts extensive training procedures and has a zero tolerance policy regarding the sale of alcohol and/or tobacco to underage persons. (LB Hearing, Appeal Hearing)

11. Tri Star Marketing, Inc. employs an outside company called BARS to conduct external stings at its businesses and also conducts its own internal stings at its businesses. These stings are attempts to purchase both alcohol and tobacco by underage persons. (Appeal Hearing)

12. Three monthly external stings are conducted at each of applicant's stores and have been so conducted since late 2003. Internal stings are conducted at every store at least once per month. (Appeal Hearing)

13. In over five (5) years, 60 months, at the Super Pantry #18 site, there have been 180 external stings for potential tobacco violations with only one (1) failure in July 2004, resulting in immediate termination of the employee. (Appeal Hearing)

14. Tri Star Marketing, Inc. also purchases ID scanners for its stores at an approximate cost of \$1,500.00 per scanner. Most stores have two scanners per store. (Appeal Hearing)

15. The ID scanners scan the ID's and calculate the age of the person. (Appeal Hearing)

16. Each store also has security cameras to provide immediate monitoring from the home office. Additionally these security cameras have the capability of burning DVD's for use by law enforcement in the event of a criminal act occurring at any given store. (Appeal Hearing)

17. The company policy of Tri Star Marketing, Inc. is that 100% of all customers requesting the purchase of alcohol products are required to show identification. (Appeal Hearing)

18. Tri Star Marketing, Inc. and Super Pantry #18 are significantly involved in community and charitable activities. In its "Coaches versus Cancer Campaign" ending February 28, 2009, Tri Star Marketing, Inc. raised \$120,000.00 in donations. These donations go back directly to the local community where the money was raised. (Appeal Hearing)

19. The Super Pantry #18 is not located within 200 feet of a church or school and in fact, there are no homes, or free standing businesses nearby. (Appeal Hearing)

20. The Super Pantry #18 sells hundreds of different products, which are typically sold in Indiana convenience stores, including but not limited to, milk, bread, soda and snacks. (LB Hearing, Appeal Hearing, ATC File)

21. The sale of alcoholic beverages on the premises of Super Pantry #18 would be less than 25% of all items sold on the premises, excluding gasoline and automotive oil products. It is estimated that from the history of sales at its other sites, less than 10% of its gross sales would be alcoholic beverages. (Appeal Hearing, ATC File)

22. There are 22 convenience stores in Tippecanoe County holding alcoholic beverage permits. (Appeal Hearing, ATC File)

23. There is no other store holding an alcoholic beverage permit within a three mile radius of Super Pantry #18, except for the package liquor store located in Dayton, Indiana. (Appeal Hearing, ATC File)

24. A survey of residents indicated that residents desire the permit. They total 635 signatures in favor of this permit. (Appeal Hearing, Exhibits 11, 12, 13)

25. Super Pantry #18 is located within the town limits of Dayton, Indiana. (LB Hearing, Appeal Hearing, ATC File)

26. The quota for type 115 grocery store permits in the town of Dayton, Indiana is four and there are no active quota permits. (Appeal Hearing, ATC file, Exhibit 15)

27. In order to compete on an equal footing with other stores and businesses in the Dayton community that sell groceries and are also allowed to sell alcoholic beverages, including convenience stores, grocery stores, drug stores and retail stores, the Super Pantry #18 needs an ATC permit to sell beer and wine. (LB Hearing, Appeal Hearing)

28. Super Pantry #18 has a fine reputation within the Dayton community and is a good corporate citizen. (LB Hearing, Appeal Hearing)

29. No businesses appeared at the LB Hearing to remonstrate against Super Pantry #18. (LB Hearing, Appeal Hearing).

30. Certain individuals appeared at the LB Hearing to remonstrate against the granting of Permit No. DL79-25457 to Super Pantry #18. There were five total remonstrators. (LB Hearing)

31. Of the five remonstrators, one was the owner of the local package liquor store and the other was a package liquor store owner with package liquor stores in Frankfort, IN and Lafayette, IN. The remaining three consisted of a former local board member, a person appearing on behalf of Drug Free Coalition of Tippecanoe County, and a lobbyist appearing on behalf of the Indiana Association of Beverage Retailers. (LB Hearing, ATC File)

32. The remonstrators at the LB hearing generally believe there are enough businesses that sold alcohol in the Dayton area and were concerned about purchases of alcohol by underage customers. (LB Hearing)

33. There was no evidence or testimony that the applicant herein was not qualified to hold the permit applied for, nor was there any testimony to deny the permit at this particular location. (LB Hearing, appeal hearing, ATC file)

34. Any finding of fact may be considered a conclusion of law if the context so warrants.

IV. CONCLUSIONS OF LAW

1. The ATC has jurisdiction over this matter pursuant to Ind. Code 7.1-1-2-2; Ind. Code 7.1-2-3-9.

2. The permit application was properly submitted pursuant to Ind. Code 7.1-3-1-4.

3. The ATC is commissioned to act upon proper application. *Id.*

4. The Hearing Judge conducted a *de novo* review of the appeal on behalf of the ATC, including a public hearing. 905 IAC 1-36-7(a); Ind. Code 7.1-3-19-11.5

5. The Hearing Judge may consider as evidence all documents in the ATC File, including the transcript of proceedings and exhibits before the Local Board. 905 IAC 1-36-7(a)

6. The Hearing Judge may also consider as evidence any codes and standards that have been adopted by an agency of this state. 905 IAC 1-36-8(e)

7. Evidence at the hearing was received in accordance with the Indiana Administrative Code and the Commission's rules. The findings here are based exclusively upon the substantial and reliable evidence in the record of proceedings and on matters officially noted in the proceeding. 905 IAC 1-37-11(e); Ind. Code 4-21.5-3-27(d)

8. Tri Star Marketing, Inc., d/b/a Super Pantry #18, permit #DL79-25457, is an applicant for an ATC Type 115 beer and wine permit.

9. The proposed permit premises is not in a residential district as referred to in Ind. Code 7.1-3-19-13 and 905 IAC 1-18-1.

10. The proposed permit premises is more than two hundred feet (200') from a church or school. Ind. Code 7.1-3-21-11

11. The Commission may issue a beer dealer's permit to an applicant who is the proprietor of a grocery store. Ind. Code 7.1-3-5-2(a)

12. The term "grocery store" means a store or part of a store that is known generally as a convenience store or food mart and is primarily engaged in the retail sale of automotive fuels and the retail sale of a line of goods that include milk, bread, soda and snacks. Ind. Code 7.1-1-3-18.5 (a)(2)(B).

13. Tri Star Marketing, Inc., d/b/a Super Pantry #18, has established that the Dayton store is a convenience store or food mart which is primarily engaged in the retail sale of automotive fuels and the retail sale of a line of goods that include milk, bread, soda and snacks.

14. Tri Star Marketing, Inc., d/b/a Super Pantry #18, is a fit and proper applicant, has maintained a reputation for decency and law obedience, and is well qualified to hold an alcoholic beverage permit under Indiana law. 950 IAC 1-27-1; Ind. Code 7.1-3-19-10

15. Tri Star Marketing, Inc., d/b/a Super Pantry #18, is of good moral character and in good repute in the community in which it does business, and is qualified to hold the permit it seeks. 950 IAC 1-27-1; Ind. Code 7.1-3-4-2(a)(2)(A)

16. The Applicant is not disqualified from holding an ATC beer and wine grocery permit. Ind. Code 7.1-3-4-2; Ind. Code 7.1-3-5-2; Ind. Code 7.1-3-15-2

17. In determining whether to issue a permit, the Commission may consider the geographic desirability of the proposed permit location, the need for the permit at the proposed location, the community's desire for the permit, and the impact of the permit on the community and other businesses. 905 IAC 1-27-4.

18. The Commission may consider both a need and desire for the permit in determining whether a permit should be issued in a particular matter. *Id.*

19. "Need" means whether the services are available at the location or in some close geographic proximity. 905 IAC 1-27-4(a)

20. "Desire" means whether individuals would purchase those products at that location, if they were available. 905 IAC 1-27-4(b)

21. A determination of whether there exists a need and desire for the services at the location in question turns on the facts of each case. *Id.*

22. Where an Applicant shows that customers would be willing to purchase alcoholic beverages if they were available for sale, such evidence constitutes a desire to receive such services at that location. 905 IAC 1-27-4(b)

23. There is no other permit store within a three mile radius of applicant, except for the package liquor store in the town of Dayton. (LB Hearing, Appeal Hearing)

24. The Applicant conducted an in-store survey of its customers and 635 signatures in favor of the permit were obtained. (LB Hearing, Appeal Hearing)

25. There are often specific requests by Super Pantry #18 customers in the Dayton store for the sale of beer and wine. (Appeal Hearing)

26. The Applicant has proven that there is a need for a beer and wine grocery permit at the Applicant's location. 905 IAC 1-27-4(a)

27. The Applicant has proven that the neighborhood and community desire to receive the services of an alcoholic beverage permit at the Applicant's location. 905 IAC 1-27-4(b)

28. All laws shall be general and administered with uniform application throughout the State. *Ind. Constitution*, Art. IV, Sec. 23; See also, *Indiana Alcoholic Beverage Commission v. Osco Drug*, 431 N.E.2d 823, 830 (Ind. App. 1982)

29. Tri Star Marketing, Inc., d/b/a Super Pantry #18, has submitted substantial evidence that it is qualified to hold an ATC Type 115 beer and wine grocery permit.

30. No evidence was submitted which would disqualify Tri Star Marketing, Inc., d/b/a Super Pantry #18, from holding a Type 115 beer and wine grocery permit at its Kendallville store location.

31. The beer and wine permit at the Dayton store will not negatively impact other businesses in the neighborhood or community.

32. To deny Tri Star Marketing, Inc.'s, d/b/a Super Pantry #18, application while granting other similarly situated applicants' applications would be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. Ind. Code 7.1-3-19-11.

33. The Local Board denied this application without sufficient evidence that would support a finding that this permit should not be issued.

34. The law is with the Applicant and against the Remonstrators at the LB Hearing.

35. The initial findings of the Local Board were: 1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law; 2) contrary to a constitutional right, power, privilege, or immunity; 3) in excess of, or contrary to, statutory jurisdiction, authority, limitations or rights; 4) without observance of procedure required by law; or 5) unsupported by substantial evidence. Ind. Code 7.1-3-19-11. Because there was no substantial evidence against the issuance of this permit at either the LB Hearing or the Appeal Hearing, for the Hearing Judge to deny this application would not be supported by substantial evidence.

Therefore, it is ORDERED, ADJUDGED AND DECREED that the finding of the Local Board to deny this application was not based on substantial evidence and must fail.

It is hereby further ORDERED, ADJUDGED AND DECREED that the evidence adduced at the LB Hearing and the Appeal Hearing was in favor of the Applicant, and the appeal of Tri Star Marketing, Inc., d/b/a Super Pantry #18, for this Type 115 permit, Permit No. DL79-25457, is granted, and the permit applied for at its Dayton store location is hereby GRANTED.

DATED:

E. Edward Dunsmore
Hearing Judge